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# Best Re (L) Ltd v Ace Jerneh Insurance Bhd (formerly known as Jerneh Insurance Bhd)

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-04(IM)(NCC)-379–12 OF 2014
ABDUL AZIZ AB RAHIM, VARGHESE GEORGE AND VERNON ONG JJCA
29 JUNE 2015

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*Insurance — Construction of policy — Arbitration clause — Claim at sessions court — Application to stay proceedings at sessions court pending matter to arbitration — Whether there was agreement to arbitrate in original policy — Whether reference to arbitration agreement found in one agreement by way of general reference sufficient to incorporate arbitration agreement into another document of contract or agreement — Whether reference must be expressly made to arbitration clause in other contract or agreement for incorporation to be valid and effective*

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The respondent/plaintiff claimed for sums owed by the appellant/defendant under three Facultative Reinsurance Slips ('3 Reinsurance Contracts') ('FRAs') for the period of insurance of 2009–2014, 2010–2016 and 2011–2017 where the respondent was the reinsured party and the appellant was the reinsurer. The three FRAs were to be read together with the standard extended warranty insurance policy ('original policy'). It was not disputed that the three FRAs did not contain any express arbitration clause or any express reference to arbitration clause ('cl 13') in the original policy. The appellant filed an application to stay the proceedings at the sessions court pending reference of the matter to arbitration. The appellant contended that cl 13 in the original policy between Sony (M) Sdn Bhd and Jerneh Insurance was incorporated by way of reference to the original policy into each of the reinsurance policy– the three FRAs. The appellant relied on the extended warranty insurance policy issued by the respondent in the original policy. The appellant contended that the agreement to arbitrate contained in cl 13 of the original policy was incorporated into the three FRAs by reference to the standard extended warranty insurance policy ('the original policy'). The sessions court allowed the appellant's application and granted a stay of proceedings. Upon appeal, the High Court judicial commissioner lifted the stay and allowed the appeal. The matter was directed to be remitted to the sessions court for trial. Being dissatisfied with the High Court's decision, the appellant appealed to this court and filed a stay application before the High Court and before this court, pending the hearing of this appeal. The sole issue in this appeal was whether the judicial commissioner was right in deciding that reference to an arbitration agreement found in one agreement by way of general reference was insufficient

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to incorporate the arbitration agreement into another document of contract or agreement; and that for the incorporation to be valid and effective the reference must be expressly made to the arbitration clause in the other contract or agreement.

**Held**, allowing the appeal:

(1) After comparing the general conditions of the insurance in the reinsurance contract and retrocession contract and having analysed the material terms and words found in the two general provisions concluded that it would apply the settled principle to bills of lading cases and held that in the absence of express incorporation in the reinsurance slips, the arbitration clause in the reinsurance contract was not incorporated into the retrocession contract (see para 31).

(2) The phrase ' ... and the reference is such as to make that clause part of the agreement' in s 9(5) of the Act would require the court to establish the intention of the parties in drafting the reference clause in their agreement. The underlying agreement or contract was the standard extended warranty insurance policy ('the original policy') issued by the respondent. The general reference clause was found in the three FRAs (see para 45).

(3) Reading the general reference in the three FRAs as it was and making reference to the original policy which were attached to the three FRAs, the court was more inclined to say that on the balance of probability it was the intention of the parties to also be bound by the terms and conditions of the original policy including cl 13 on arbitration. If it was otherwise, then it would have been for the respondent to expressly exclude cl 13 from being extended to the three FRAs (see para 46).

(4) With regard to the respondent's argument that they were not party to the agreement with Sony, the court opined that it was not prejudicial because the original policy with full terms and conditions including cl 13 on arbitration was attached to the three FRAs. It is trite law that in dealing with commercial contracts or transactions, the court must strive to give business efficacy to the commercial arrangement between the parties and not to strike down the business transaction or arrangement unless the court finds on the face of it, it was so repugnant to enforce the transaction (see para 47).

**[Bahasa Malaysia summary**

Responden/plaintif menuntut bagi jumlah yang kena dibayar oleh perayu/defendan di bawah tiga Facultative Reinsurance Slips (tiga kontrak insurans semula) ('FRA') bagi tempoh insurans untuk tahun 2009–2014, 2010–2016 dan 2011–2017 di mana responden adalah pihak yang menginsuranskan semula dan perayu adalah penanggung insurans semula.

Ketiga-tiga FRA hendaklah dibaca bersama dengan *Standard extended warranty insurance policy* ('polisi asal'). Ia tidak dipertikaikan bahawa ketiga-tiga FRA tidak mengandungi apa-apa klausa timbang tara nyata atau apa-apa rujukan nyata kepada klausa timbang tara ('klausa 13') dalam polisi asal. Perayu memfailkan permohonan untuk menangguhkan prosiding di mahkamah sesyen sementara menunggu rujukan perkara kepada timbang tara. Perayu berhujah bahawa klausa 13 dalam polisi asal di antara Sony (M) Sdn Bhd dan Jerneh Insurance digabungkan melalui rujukan kepada polisi asal ke dalam setiap polisi insurans semula– ketiga-tiga FRA. Perayu bergantung ke atas polisi insurans jaminan lanjutan yang dikeluarkan oleh responden dalam polisi insurans. Perayu berhujah bahawa perjanjian untuk menimbang tara yang terkandung dalam klausa 13 polisi asal digabungkan ke dalam ketiga-tiga FRA dengan rujukan kepada polisi asal. Mahkamah sesyen membenarkan permohonan perayu dan memberikan penggantungan prosiding. Atas rayuan, pesuruhjaya kehakiman Mahkamah Tinggi mengangkat penggantungan dan membenarkan rayuan. Perkara diarahkan untuk diremit kepada mahkamah sesyen untuk perbicaraan. Tidak berpuas hati dengan keputusan Mahkamah Tinggi, perayu merayu kepada mahkamah ini dan memfailkan permohonan penggantungan di hadapan Mahkamah Tinggi dan mahkamah ini, sementara menunggu pendengaran rayuan ini. Satu-satunya isu dalam rayuan ini adalah sama ada pesuruhjaya kehakiman adalah betul dalam memutuskan bahawa rujukan kepada perjanjian timbang tara yang didapati dalam satu perjanjian melalui rujukan am adalah tidak mencukupi untuk menggabungkan perjanjian timbang tara ke dalam dokumen kontrak atau perjanjian yang lain; dan bahawa untuk penggabungan menjadi sah dan efektif rujukan mesti secara nyata dibuat kepada klausa timbang tara di dalam kontrak atau perjanjian lain.

**Diputuskan**, membenarkan rayuan:

(1) Selepas membezakan syarat am insurans dalam kontrak insurans semula dan kontrak retrosisen dan dengan menganalisa terma-terma material dan perkataan-perkataan yang didapati di dalam dua peruntukan am memutuskan bahawa ia akan mengguna pakai prinsip yang ditetapkan kepada kes-kes bil muatan dan memutuskan bahawa dalam ketiadaan penggabungan nyata dalam slip insurans semula, klausa timbang tara dalam kontrak insurans semula tidak digabungkan ke dalam kontrak retrosisen (lihat perenggan 31).

(2) Frasa ' ... and the reference is such as to make that clause part of the agreement' dalam s 9(5) Akta akan mengkehendaki mahkamah untuk membuktikan niat pihak-pihak dalam mendraf klausa rujukan dalam perjanjian mereka. Perjanjian yang menjadi dasar atau kontrak adalah standard polisi insurans jaminan yang dilanjutkan ('polisi asal') yang dikeluarkan oleh responden. Klausa rujukan am yang didapati di dalam ketiga-tiga FRA (lihat perenggan 45).

(3) Membaca rujukan am di dalam ketiga-tiga FRA dan dengan membuat rujukan kepada polisi asal yang dikepilkan kepada ketiga-tiga FRA, mahkamah lebih cenderung untuk menyatakan bahawa atas imbangan kebarangkalian ia adalah niat pihak-pihak untuk juga terikat oleh terma dan syarat polisi asal termasuk klausa 13 atas timbang tara. Jika ia sebaliknya, oleh itu ia adalah untuk responden secara nyata mengecualikan klausa 13 daripada dilanjutkan kepada ketiga-tiga FRA tersebut (lihat perenggan 46).

(4) Berkaitan hujahan responden bahawa mereka bukan pihak kepada perjanjian dengan Sony, mahkamah berpendapat bahawa ia tidak prejudis kerana polisi asal dengan terma dan syarat penuh termasuk klausa 13 atas timbang tara dikepilkan kepada ketiga-tiga FRA tersebut. Adalah undang-undang nyata bahawa dalam menguruskan kontrak komersial atau transaksi, mahkamah mesti berusaha untuk memberi keberkesanan kepada penyusunan komersial di antara pihak-pihak dan bukan untuk membatalkan transaksi perniagaan atau penyusunan kecuali mahamah mendapati atas mukanya, ia adalah amat bertentangan untuk menguatkuasakan transaksi tersebut (lihat perenggan 47).]]]

**Notes**

For cases on construction of policy in general, see 8(1) *Mallal's Digest* (5th Ed, 2015) paras 57–73.

**Cases referred to**

*Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* [2010] 3 MLJ 656; [2010] 7 CLJ 785, CA (refd)

*Aspdin v Austin* (1844) 5 QB 671, QBD (refd)

*Astel-Peiniger Joint Venture v Argos Engineering & Heavy Industries Co Ltd* [1994] 3 HKC 328, HC (refd)

*Cigna Life Insurance Co of Europe SA-NV & Ors v Intercaser SA de Seguros y Reaseguros* [2001] All ER (D) 90 ; [2001] Lloyd's Rep IR 821, QBD (refd)

*Excess Insurance Co v Mander* [1997] 2 Lloyd's Rep 119 (refd)

*Federal Bulk Carriers Inc v C Itoh & Co Ltd, The Federal Bulke* [1989] 1 Lloyd's Rep 103, CA (refd)

*Gay Construction Pty Ltd & Anor v Caledonian Techmore (Building) Ltd (Hanison Construction Co Ltd, Third Party)* [1994] 2 HKC 562, HC (refd)

*International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd & Anor* [2014] 1 SLR 130, CA (refd)

*Pine Top Insurance Co Ltd v Unione Italiana Anglo Saxon Reinsurance Co Ltd* [1987] 1 Lloyd's Rep 476, QBD (refd)

*Sigur Ros Sdn Bhd v Malayan Banking Bhd & Anor* [2013] 8 CLJ 86, HC (refd)

*Thomas & Co Ltd v Portsea Steamship Co Ltd* [1912] AC 1, HL (refd)

*Trygg Hansa Insurance Co Ltd v Equitas Ltd* [1998] 2 Lloyd's Rep 439, QBD (refd)

A *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182, SC (refd)

**Legislation referred to**

B Arbitration Act 2005 ss 9, 9(5)
Interpretations Act 1948 and 1967 s 17(A)
Arbitration Act 2002 [SG] s 4(7)
Arbitration Act 1996 [UK] s 2, 2(6)

C **Appeal from**: Civil Appeal No 12ANCC-117–08 of 2014 (High Court, Kuala Lumpur).

*Lim Chee Wee (Loo Peh Fern with him) (Skrine) for the appellant.*
*Farik bin Tunku Ismail (Tan Sixin with him) (Azim Tunku Farik & Wong) for the respondent.*

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**Abdul Aziz Ab Rahim JCA:**

INTRODUCTION

E **[1]** The material background facts to this appeal can be found in the grounds of judgment of the High Court and these are re-produced below for easy reference:

> 2. The appellant company ('appellant') is an insurance company which has issued
F consecutive insurance policies for the insurance periods of 2009 to 2011 (Insurance Policies) to Sony (M) Sdn Bhd (Sony). The Insurance Policies provide for Sony's indemnification by the appellant in respect of specified of Sony which require repair and/or replacement.
>
> 3. The Insurance Policies have an arbitration clause ('Arbitration Clause') as follows:
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> > 13.1 All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by both parties or if they cannot agree upon a single arbitrator, to the decision of two arbitrators of whom one shall be appointed in writing by each of the parties respectively and in case of disagreement/dispute between
H arbitrators, the difference shall be referred to the decision of an umpire who shall have been appointed in writing by the arbitrators before entering on the reference, and an award by arbitration shall be a condition precedent to any right to action against ('Appellant') as regards any dispute regarding the amount of the ('Appellant's') liability under this policy.
>
I 4. The appellant and the respondent company ('respondent') entered into 3 'Facultative Reinsurance Slips' (3 Reinsurance Contracts) (in this appeal will be referred to 3 FRAs) for the following consecutive periods:
>
> (a) from 1 November 2009 to 31 October 2014 (1st Reinsurance Contract);

(b) from 1 November 2010 to 31 October 2016 (2nd Reinsurance Contract); and

(c) from 1 November 2011 to 31 October 2017 (3rd Reinsurance Contract.

5. Except for the period of reinsurance, the 3 Reinsurance Contracts have similar terms as follows:

| | |
|---|---|
| Class of Insurance | Extended Warranty Insurance Programme |
| Period of Insurance | ... |
| The cedant | [Appellant] |
| The insured | [Sony] |
| Insured's address | ... |
| Principal Coverage | Indemnification to the Insured if any of the Specified Sony Product sold/financed by the Insured during the Period of Insurance shall require repair and/or replacement due to the mechanical or electrical breakdown of the Components or Parts and causing a sudden stoppage of its function during the Extended Warranty Period. |
| Interest Insured | On all new Electrical Items sold on or after [specified period] and declared to the [Appellant] during the Period of Insurance. |
| Limit of Liability | Means the maximum liability of the [Appellant], with respect to any one claim, shall not exceed the value of the replacement of the damaged part with a new part or with material of an equivalent or similar kind and quality, or the purchase price of the Specified Sony Product at the time of purchase, as the case may be. |
| Territorial Limit | Anywhere within Malaysia (including Sabah and Sarawak) |
| *Extensions/clauses* | As per Standard Extended Warranty Insurance Policy issued by [Appellant] as attached. |
| Warranties | - Premium Warranty (60 days) Endorsement<br>- Date Recognition Clause (Y2K Exclusion) |
| Exclusions | As per standard Extended Warranty Insurance Policy issued by [Appellant] as attached |

| | |
|---|---|
| Conditions | The above acceptance is subject to an Annual Rate Review on the Premium Structure and Automatic Renewal Clause |
| Excess/Deductible | Nil |
| Rate | As per price list as attached |
| Reinsurance Broker | Aon Insurance Brokers (M) Sdn Bhd (Company No. 7544-A) [Insurance Brokers] |
| Total deduction | Ceding commission + RI brokerage 30% OGR + 5% ONR |
| Levy/Tax | 0.25% IGSF (as per directive by Bank Negara Malaysia from time to time) 1.25% Overseas tax on premium ceded overseas or as applicable as advised by Inland Revenue Department, Malaysia. Not applicable to Malaysian registered reinsurers and reinsurers licensed in Labuan under Offshore Insurance Act 1990. |
| Cedant retention | 15% of Original Benefits and Limits |
| Reinsurer(s) order | 85% of Original Benefits and Limits |

**[2]** The respondent/plaintiff is claiming for sums owed by the appellant/defendant under three FRAs for the period of insurance of 2009–2014, 2010–2016 and 2011–2017 where the respondent is the reinsured party and the appellant is the reinsurer. It is undisputable fact that the three FRAs are to be read together with the standard extended warranty insurance policy ('original policy')

**[3]** It is not disputed that the three FRAs do not contain any express arbitration clause or any express reference to cl 13– arbitration clause in the original policy.

**[4]** The appellant filed an application to stay the proceedings at the sessions court pending reference of the matter to arbitration. The appellant contend that the arbitration clause ('cl 13') in the original policy between Sony (M) Sdn Bhd and Jerneh Insurance (as the respondent was formerly known) was incorporated by way of reference to the original policy into each of the reinsurance policy– the three FRAs. The appellant relies on the extended warranty insurance policy issued by the respondent in the original policy.

**[5]** The appellant contend that the agreement to arbitrate contained in cl 13 of the original policy was incorporated into the three FRAs by reference to the standard extended warranty insurance policy (the original policy).

**[6]** In so far as it relates to the reference to the arbitration clause ie cl 13 in the original policy, the general reference made in the three FRAs are as follows:

| | |
|---|---|
| Extensions/clauses | As per standard extended warranty insurance policy issued by Jerneh Insurance Berhad (Company No: 9827-A) as attached. |
| Exclusions | As per standard extended warranty insurance policy as attached |

**[7]** The learned sessions court allowed the appellant's application and granted a stay of proceedings on 14 August 2014. Upon appeal, the learned High Court Judicial Commissioner lifted the stay and allowed the appeal on 11 November 2014. The matter was directed to be remitted to the sessions court for trial.

**[8]** Being dissatisfied with the High Court's decision, the appellant appealed to this court and filed a stay application before the High Court and before this court, pending the hearing of this appeal.

THE RESPONDENT'S SUBMISSION

**[9]** The learned High Court Judicial Commissioner correctly held that the sole question to be determined is whether the arbitration clause (cl 13) in the original policy has been incorporated into the three FRAs within the meaning of s 9(5) of the Arbitration Act 2005 . Section 9(5) provides that:

> A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

**[10]** The respondent submitted that the provision of s 9(5) as highlighted is very clear in that the intention of parties to incorporate an arbitration clause into their contract must be specific and unequivocal; it cannot be inferred or imputed by a mere general reference of the original policy in the three FRAs.

**[11]** It was submitted by the respondent that the learned judicial commissioner correctly held that despite such clear format, there was absolutely no mention of an arbitration clause in the FRAs, and that the format therefore evinces the parties' manifest intention not to incorporate the arbitration clause. In addition, by applying the maxim of construction, *expressio unius est exclusio alterius*, ie the express mention of one matter, implies the exclusion of matters which have not been mentioned, the learned judicial commissioner had correctly held that there cannot be said to have been any manifest intention between the parties to refer their dispute under the FRAs to

A arbitration. Indeed, the learned High Court judicial commissioner stated that he could find nothing in the FRAs to show that the parties had intended to incorporate the arbitration clause into the FRAs.

B **[12]** It was argued that the arbitration clause (cl 13) of the original policy mentions reference of differences to arbitration, that is an agreement to arbitrate between the respondent and Sony only. The appellant is not privy to this arbitration agreement at all.

C **[13]** Learned counsel for the respondent also submitted that it is important to note that this claim involves a reinsurance arrangement where the respondent has issued insurance coverage in favour of Sony via the original policy, and has in turn ceded/reinsured the same risk to the appellant via the three FRAs.

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**[14]** It was argued that the interpretation and workings of insurance and reinsurance matters have long been recognised as being unique of its own industry in light of the industry practice and the application of specific insurance principles that may wholly contradict the usual principles of E contract, eg the effect of a breach of insurance policy warranty is different from a breach of warranty under a non-insurance contract.

**[15]** It was submitted that the High Court has correctly referred to and F adopted the position taken in England and Wales particularly in respect of reinsurance arrangements. The reasons for these are two folds. Firstly, our s 9 Arbitration Act 2005 is similar to s 6 of the Arbitration Act 1996 English and therefore English cases on the interpretation of s 6 are relevant to the statutory construction of our s 9; and secondly, as recognised by the Supreme Court in G *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182, it is important in matters of commercial law that there is an uniformity of common law in the Commonwealth. More specifically, given the global importance of the English insurance market, which includes the Lloyd's syndicates operating at Lloyd's of London, it is clearly important that the law of H re-insurance in Malaysia continues to be consistent with the law of England and Wales.

**[16]** It was submitted that the law is settled in England and Wales in respect of reinsurance arrangements that the 'arbitration agreement' must be expressly I incorporated into the reinsurance contract for it to be validly binding between the insurer and the reinsurer.

**[17]** Therefore it was argued that the English position is on all fours with the present appeal.

**[18]** In the 1998 case of *Trygg Hansa Insurance Co Ltd v Equitas Ltd* [1998] 2 Lloyd's Rep 439, the court held that the provision 'Except as otherwise provided herein this policy is to follow the same terms, exclusions, conditions, definitions and settlements as the Policy of the Primary Insurers' was insufficient to constitute a valid extension of the 'arbitration agreement'. His Honour Judge Raymond Jack, QC commented at p 447 that:

> I have concluded that the right course in these circumstances is for me to apply the law as stated in Excess v Mander. That provides for consistency and certainty. So I hold that, in the absence of special circumstances, general words of incorporation are not to be treated as effective for the purposes of s 6(2) of the 1996 Act ... In accordance with the law as I have concluded I should apply it, these words are not to be taken as indicating an intention to incorporate the arbitration clause from the general conditions to the primary insurance ...

It was submitted that our s 9(5) is similarly worded as the English s 6(2).

**[19]** Thus, on the authority of several cases in England which interpret s 6 of the English Arbitration Act 1996 (which is in pari materia with our s 9). It was submitted that the above rationale and the settled position under English law should be applied in this case; an 'arbitration agreement' is in fact a contract on its own and it needs to be expressly incorporated into a reinsurance contract by way of distinct and specific words for it to be binding between the insurer and reinsurer.

**[20]** It was submitted that the general words of reference to the original policy in the three FRAs are not sufficient for the purpose of the incorporation of the arbitration clause. They were merely to make sure that the risks undertaken by the appellant (as the reinsurer) are identical to that undertaken by the respondent (as the reinsured or the primary insurer). These words are insufficient to validly incorporate or constitute an 'arbitration agreement' between the appellant and the respondent under the reinsurance arrangements.

**[21]** As such, there is in fact no binding 'arbitration agreement' between the appellant and the respondent to warrant a stay of the sessions court proceedings.

THE ISSUE

**[22]** The sole issue in this appeal is whether the learned judicial commissioner was right in deciding that reference to a arbitration agreement found in one agreement by way of general reference is insufficient to incorporate the arbitration agreement into another document of contract or agreement; and that for the incorporation to be valid and effective the reference

must be expressly made to the arbitration clause in the other contract or agreement.

APPELLANT'S SUBMISSION

**[23]** It is clear that from the English authorities cited and referred to by learned counsel for the respondent, the English Court has taken a very narrow and restrictive approach in construing a general reference clause to include the incorporation of an arbitration clause found in one agreement into another agreement. The rational for this strict approach can be found in the passage by Bingham LJ in *Federal Bulker Carriers Inc v C Itoh & Co Ltd, The Federal Bulke* [1989] 1 Lloyd's Rep 103 when His Lordship said as follows:

> 64 Generally speaking, the English law of contract has taken a benevolent view of the use of general words to incorporate by reference standard terms to be found elsewhere. But in the present field a different, and stricter, rule has developed, especially where the incorporation of arbitration clauses is concerned. The reason no doubt is that a bill of lading is a negotiable commercial instrument and may come into the hands of a foreign party with no knowledge and no ready means of knowledge of the terms of the charterparty. The cases show that a strict test of incorporation having, for better or worse, been laid down, the Courts have in general defended this rule with some tenacity in the interests of commercial certainty. If commercial parties do not like the English rule, they can meet the difficulty by spelling out the arbitration provision in the bill of lading and not relying on general words to achieve incorporation.

**[24]** However, learned counsel for the appellant urged upon the court to adopt a more general and liberal approach in interpreting and giving effect to the reference clause for the incorporation of an arbitration clause found in one agreement into another agreement. His first argument is that the Malaysian Arbitration Act 2005 is based upon and is reflective of the UNCITRAL Model Law on International Commercial Arbitration 1985. Learned counsel submitted that the UNCITRAL Model Law 1985 (now with 2006 Amendments), provides a standard model to assist nations in modernising and reforming the features of statutory provisions in national arbitration law. The relevant article in the UNCITRAL Model Law on which s 9(5) of the Act is based, is Article 7(2) which reads as follows:

> 7(2) ... the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

**[25]** Learned counsel also pointed out that the English s 6(2) of the 1996 Act and the Singapore s 4(7) of the Arbitration Act 2002 Singapore are similarly worded. It was submitted however that though our s 9(5) and the English s 6(2) are similarly worded, the English provision is not reflective of the UNCITRAL

Model Law. Learned counsel supported this proposition by referring to the passage by Bingham LJ in Federal Bulker where the learned Lord Justice says that 'In general the English Law on contract has taken a benevolent view of the use of general words to incorporation by reference standard terms to be found elsewhere'. However, in the same passage the learned Lord Justice had drawn a distinction between cases of general contract and cases involving bill of lading. His Lordship argued that the strict test of incorporation in bill of lading cases was adopted in the interest of commercial certainty because a bill of lading is a negotiable commercial instrument and may come into the hands of foreign party with no knowledge and no ready means of knowledge of the terms of the charterparty.

OUR OPINION

**[26]** The starting point is s 9 of the Arbitration Act 2005 , in particular s 9(5) which reads as follows:

> (5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

**[27]** Reading the section it is obvious that incorporation of an arbitration clause in one agreement may be made by way of reference to an arbitration clause found in another agreement, in most instances, the agreement that exist between the same parties. But, what is most important is that the reference clause must be clear as to the intentions of the parties to incorporate that particular arbitration clause in their agreement. We say so because of the expression '... the reference is such as to make that clause part of the agreement', found in s 9(5) of the Act.

**[28]** The question is, as to in what form the reference clause should be worded. Must the reference clause make an express and specific reference to the arbitration clause in the other agreement for it to be effectively incorporated as contended by the respondent in this appeal or will a general reference clause as found in the three FRAs and contended by the appellant be sufficient? Both the appellant and the respondent are agreeable that there are presently no reported cases in Malaysia that have dealt with this issue.

**[29]** The respondent contended that the reference clause must be express and specific in the reference to the arbitration clause that is to be incorporated in the agreement between the parties. Learned counsel for the respondent urged the court to adopt the position in England and Wales, particularly in respect of reinsurance arrangement that a specific and express reference is a must. His first argument is that our s 9 of the Act is similar to s 6 of the English Arbitration Act 1996. The English s 6 reads as follows:

> 6(1) In this Part an 'arbitration agreement' means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).
>
> (2) The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.[94]

It can be seen that our s 9 and the English s 6 are similar in substance.

**[30]** Learned counsel for the respondent also referred to English case of *Pine Top Insurance Co Ltd v Unione Italiana Anglo Saxon Reinsurance Co Ltd* [1987] 1 Lloyd's Rep 476 which he submitted to be on all fours with the present appeal. In that case the insurance contract and retrocession contract contained a provision which reads:

> All terms, clauses and conditions as original. To pay as paid thereon, but subject nevertheless to the terms, clauses and conditions of this reinsurance.

**[31]** In that case the court, after comparing the general conditions of the insurance in the reinsurance contract and retrocession contract and having analysed the material terms and words found in the two general provisions concluded that it would apply the settled principle to bills of lading cases and held that in the absence of express incorporation in the reinsurance slips, the arbitration clause in the reinsurance contract is not incorporated into the retrocession contract. Similar stand were taken by the English Court in later cases, that is, the use of general words would not have the effect of incorporating a pre-existing arbitration clause into subsequent agreement between the parties (see *Excess Insurance Co v Mander* [1997] 2 Lloyd's Rep 119 and *Trygg Hansa Insurance Co Ltd v Equitas Ltd* [1998] 2 Lloyd's Rep 439).

**[32]** Learned counsel for the respondent also referred to the case of *Cigna Life Insurance Co of Europe SA-NV & Ors v Intercaser SA de Seguros y Reaseguros* [2001] All ER (D) 90; [2001] Lloyd's Rep IR 821 where a similar general condition in the reinsurance policy clause was found and it was argued that such clause was sufficient to incorporate the arbitration clause contained in the underlying policy. Morison J in that case rejected this argument and the rationale for this was 'The legal justification for this conclusion comes from the special position which these clauses have in English law. An agreement to arbitrate disputes is regarded as personal to the parties to the agreement and collateral to the main obligations'.

**[33]** The learned High Court judge agreed with the submissions by learned counsel for the respondent as above and had further accepted the rationale in the case of *Trygg Hansa Insurance Co Ltd v Equitas Ltd & Ors* [1998] 2 Lloyd's

Rep 439 for this strict approach that it is not only because of the need of certainty and consistency in applying the general reference clause in relation to the incorporation of an arbitration clause by way of reference but also because an arbitration agreement is an agreement in its own right and its personal to the parties in question; and therefore the parties should expressly incorporate an arbitration clause in their agreement if they so wished.

**[34]** The development of the strict test of incorporation in English law can be traced back to the case of *Thomas & Co Ltd v Portsea Steamship Co Ltd* [1912] AC 1, wherein the House of Lords held that an arbitration clause in the charter party was not incorporated into the bill of lading in the absence of a specific reference to the arbitration clause.

**[35]** Be that as it may, current global developments in most common law jurisdiction (except for England) have shown a healthy and refreshing trend that may further boost the application of arbitration as a preferred choice of an alternative dispute resolution particularly amongst the commercial community. Hong Kong, for example, is also a common law jurisdiction and also a model law compliant State. But, judicial pronouncements by Hong Kong courts in recent decisions on this issue show a departure from the strict English approach. In *Astel-Peiniger Joint Venture v Argos Engineering & Heavy Industries Co Ltd* [1994] 3 HKC 328, the Hong Kong High Court– Court of first instance in construing article 7(2) of the UNCITRAL Model Law said that the proposition laid down in the House of Lord case of *Thomas v Portsea* that the arbitration clause must be specifically referred to before it can be satisfactorily incorporated has no application in Hong Kong. The court went on to say that in determining whether or not there has been incorporation by reference is one of construction namely to ascertain the parties' intentions when they entered into the contract by reference to the words used by the parties. This decision was affirmed by the Hong Kong High Court in another case namely *Gay Construction Pty Ltd & Anor v Caledonian Techmore (Building) Ltd (Hanison Construction Co Ltd, Third Party)* [1994] 2 HKC 562.

**[36]** Similarly in Singapore the courts have taken a robust approach in departing from applying the strict English approach. In *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd & Anor* [2014] 1 SLR 130, the Singapore Court of Appeal adopted the approach in the Hong Kong cases of *Astel-Peiniger Joint Venture* and *Gay Construction Pty Ltd & Anor* and refused to follow the English position. Sundaresh Menon CJ who delivered the judgment in that case put aside the English authorities and said that 'the strict rule has been overextended impermissibly from its original application in the context of bill of lading and charter parties'.

**[37]** From these developments in this particular area of the law it is possible

and can be argued that the English strict approach is peculiar and unique to bill of lading cases and charter parties, and also to cases where the first contract or agreement which contained the arbitration clause or agreement is not readily available to the party who enters into the second contract.

**[38]** Learned counsel for the appellant submitted that for those jurisdictions which based their arbitration law on the UNCITRAL Model Law as in the case of our Arbitration Act 2005 (and similar jurisdictions such as Hong Kong and Singapore) the justification to move away from the English strict test of incorporation can be found in the UNCITRAL Working Group Report and comments on the Model Law. In one of the comments by the working group which was referred to and quoted in the Hong Kong case of *Gay Construction* it was said that the requirement that the reference be such as to make the arbitration clause a part of the contract did not mean that the contract had to make explicit reference to the arbitration clause itself.

**[39]** Another commentator David Joseph QC in his book 'Jurisdiction and arbitration agreements and their enforcement' has also expressed similar views. In so doing he had referred to the positions in Canada, Hong Kong, Bermuda, Switzerland and France as well as United States where general words of incorporation were recognised to be sufficient.

**[40]** In our own jurisdiction, our courts have also taken a similar approach (see *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* [2010] 3 MLJ 656; [2010] 7 CLJ 785, CA). However, in a later case *Sigur Ros Sdn Bhd v Malayan Banking Bhd & Anor* [2013] 8 CLJ 86, the High Court adopted the strict English approach after considering the line of English cases on the point. But in that case the High Court was not referred to the Court of Appeal decision in *Albilt Resources Sdn Bhd*.

**[41]** It would appear that in Malaysia the position is not settled. Learned counsel for the appellant was candid enough to admit that the decision of the Court of Appeal in *Albilt Resources Sdn Bhd* to take the general approach and give a reference clause a liberal interpretation was not based on any consideration of the Model Law or made with any detailed discussion of the external judicial approaches. In this instant case, the learned High Court judge in allowing the appeal by the respondent and setting aside the stay application granted by the session court, had said in para 25 of his judgment as follows:

> ... more importantly, as explained above, in the interest of uniformity of law of re-insurance in Malaysia and England, I am reluctant to adopt a construction of the three Reinsurance Contracts which is different from the Approach by English Courts.

**[42]** From the above passage, it is obvious that the learned High Court

judge, in refusing to adopt a robust approach in dealing with the issue, was primarily concerned with maintaining uniformity of law of insurance and reinsurance in Malaysia with that of England.

**[43]** On our part, whilst we are appreciative of the fact that the English s 6(2) and our s 9(5) of the Act are similarly worded, we must also consider the intention of the legislature when it decided to adopt the UNCITRAL Model Law in drafting s 9(5). As we have seen above, when the Model Law was proposed the working group on the Model Law made it very clear (and this is supported by the numerous comments by textbook writers and commentators on the Model Law) that it was not the intention of article 7(2) of the Model Law to make it a necessary requirement to make specific reference to an arbitration clause or agreement in one document before it can be incorporated in another agreement. The working group on the Model Law made it very clear that a general reference would suffice to give effect to the incorporation. In our opinion the principle that the court should attempt to give business efficacy in interpreting and construing a commercial document or contract, must be applied liberally to save the commercial transactions entered into between the parties and not to disrupt them. This does not, however, mean that the court must disregard all established principles of construction of documents and contracts. What it means is that within the perimeter of these principles, the court ought to be courageous enough to apply the principle in most beneficial way that would contribute to the efficacy of doing business and to ensure that the law stays abreast with the real commercial world. This is particularly important because the business community and the commercial people are normally innovative and creative. The ways of doing businesses keep changing and the law has to keep up with it lest it becomes obsolete and could hamper and stifle trade and commerce.

**[44]** However, we must also remember that as a court of law our primary obligation in interpreting or construing any given provision of a statute as in the case of s 9(5) here, we must give each word of the statute or the provision under consideration its plain and ordinary meaning. At the same time, we must also be mindful of the purpose of the provision being drafted or legislated. This is the purposive approach in construing a statute. This requirement is explicitly provided for in s 17(A) of the general clauses and Interpretations Act 1948 and 1967.

**[45]** Bearing this in mind, we are of the view that the phrase '... and the reference is such as to make that clause part of the agreement' in s 9(5) of the Act would require the court to establish the intention of the parties in drafting the reference clause in their agreement. In our case the underlying agreement or contract is the standard extended warranty insurance policy ('the original policy') issued by the respondent. The general reference clause is found in the

three FRAs. The general reference clause are as follows:

| | |
|---|---|
| Extensions/clauses | As per standard extended warranty insurance policy issued by Jerneh Insurance Berhad (Company No: 9827-A) as attached. |
| Exclusions | As per standard extended warranty insurance policy as attached |

**[46]** We noted that unlike the English case of *Pine-Top Insurance Co* the general reference as to extensions and clauses as well as in relation to exclusions is stated 'as per standard extended warranty insurance policy as attached'. It appears to us that the whole original policy was referred to and intended to be applied to the three FRAs. It is pertinent in this regard to note that the respondent did not deny the fact that the original policy has to be read together with the three FRAs. The only point in dispute is that the respondent is saying that such reading does not include cl 13 of the original policy on arbitration. We are not convinced. In our view, reading the general reference in the three FRAs as it is and making reference to the original policy which were attached to the three FRAs we are more inclined to say that on the balance of probability it was the intention of the parties to also be bound by the terms and conditions of the original policy including cl 13 on arbitration. If it was otherwise, then it would have been for the respondent to expressly exclude cl 13 from being extended to the three FRAs.

**[47]** With regard to the respondent's argument that they are not party to the agreement with Sony, we are of the view that it is not prejudicial because the original policy with full terms and conditions including cl 13 on arbitration was attached to the three FRAs. It is trite law that in dealing with commercial contracts or transactions, the court must strive to give business efficacy to the commercial arrangement between the parties and not to strike down the business transaction or arrangement unless the court finds on the face of it, it is so repugnant to enforce the transaction.

**[48]** In dealing with this case we must also be conscious of the global general trend to encourage arbitration as an alternative to a dispute resolution particularly so among the commercial and business community. The uniqueness of arbitration as a means to resolve dispute where it enables the disputing parties to have their dispute referred to and determined by experts or persons of their choice can be of great advantage to the parties. In this respect the court should be slow in striking out an arbitration agreement between the parties if the court finds that there is a clear intention of the parties to refer their dispute to arbitration.

**[49]** Finally we would address the supplementary written submissions put in

by the parties during the period this appeal was adjourned after hearing the parties in open court pending our deliberations and decision. These supplementary written submissions were firstly filed by the respondent in response to the question raised by our learned brother Justice Varghese during the course of the hearing. The question that was asked was this: whether it is correct that a general reference of incorporation in a contract should be understood to include all clauses therein and that no exceptions applied unless specifically referred to. The supplementary written submission was filed by Mr Lim Chee Wee counsel for the appellant vide a letter to the registrar of the Court of Appeal dated 17 February 2015. This was filed pursuant to r 22 of the Legal Profession (Practice and Etiquette) Rules 1976 because during course of the hearing, counsel for the appellant had answered the question posed in affirmative but he did not produce any authority to support his answer. The respondent counsel had responded to the appellant supplementary written submission in the submission in reply which was sent to the registrar by letter dated 3 March 2015. Both submissions have been brought to our attention and we will now deal with it.

**[50]** In his supplementary written submission learned counsel for the appellant referred to two authorities to support his contention that it is correct that a general reference of incorporation in a contract should be understood to include all clauses therein and that no exceptions or exclusions applied unless specifically referred to. The first authority is a passage from the book by Kim Lewison QC *The Interpretation of Contracts*, (3rd Ed) (Sweet & Maxwell) where at para 7.05 at pp 203–204, the learned author said:

> where the contract expressly mentions some things, it is often to be inferred that other things of the same general category which are not expressly mentioned were deliberately omitted. Similar principles apply to the express inclusion of obligations dealing with a particular area of application.

In the same passage, the learned author also referred to a passage by Lord Denman CJ in the case of *Aspdin v Austin* (1844) 5 QB 671, where it was said that '(W)here parties have entered into written engagements, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument'.

**[51]** The second authority referred to by learned counsel for the appellant is a passage from the book *Indian Contract & Specific Relief Acts* by Nilima Bhadbhade, (12th Ed Vol 1) (Pollock & Mulla) at p 260 where it was said as follows:

> Where the document is expressed to be supplemental to another document, the whole of such other document may be looked into. Where the terms and conditions

A of supply of the first contract were incorporated by reference in the second contract, only the normal incidents of terms and conditions of supply which are connected with supply such as, its mode and process, time factor, inspection and approval, if any, reliability of transit, incidental expenses etc stood incorporated in the second contract and not the arbitration clause. The arbitration clause of an earlier contract B can, however, by reference be incorporated in a latter contract, provided it is not repugnant to or inconsistent with the terms of the contract in which it is incorporated.

**[52]** Relying on these two authorities above, learned counsel for the C appellant submitted that the wording of the terms on 'extension/clauses' in the FRAs which reads:

| | |
|---|---|
| Extensions/clauses | As per standard extended warranty insurance policy issued by Jerneh Insurance Berhad (Company No: 9827-A) as attached. |

D

is sufficiently wide to include the reference to the arbitration clause ie cl 13 in the original policy into the FRAs because the arbitration clause is not repugnant or inconsistent with the terms of the contract in the FRAs.

E

**[53]** Learned counsel for the respondent, however, argued that reading the passage cited by the appellant counsel from the book *Indian Contract & Specific Relief Acts*, the inclusion of the terms and conditions found in one contract by reference to the another contract is only confined to the normal incidents of F terms and conditions and not the arbitration clause. To include the reference to arbitration clause it was contended that there must be a very specific reference to it. We do not accept this submission. In our view that passage cited by the appellant counsel from the book *Indian Contract & Specific Relief Acts* discussed only on the issue of terms and conditions of supply in the first contract which G were incorporated in the second contract by reference. In our case the reference was made to the whole original policy which include cl 13 on arbitration. Therefore, the factual matrix on this point in this appeal can be distinguished from the example discussed in that passage.

H

**[54]** Therefore, with regard to this supplementary submission we prefer the interpretation advanced by learned counsel for the appellant.

**[55]** For the above reasons, we are of the unanimous view that this appeal be I allowed with agreed cost of RM25,000 here and below to the appellant. Deposit is ordered to be refunded to the appellant. Consequently, we set aside the High Court order and restored the session court order for stay.

*Appeal allowed.*

Reported by Afiq Mohamad Noor